IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 6682 of 2005
With
CRIMINAL MISC.APPLICATION No. 6686 of 2005
With
CRIMINAL MISC.APPLICATION No. 6687 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL

HONOURABLE MR.JUSTICE J.R.VORA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SHRI SATISH CHAND SINGHAL
Versus
THE STATE OF GUJARAT & ORS

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Appearance :
MR VIREN G DAVE for Applicants
MR HM PRACHCHHAK APP for Respondent No.1
MR AJAY R MEHTA for Respondent No. 2
None for Respondents No.3 - 4.

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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE J.R.VORA

Date : 10/03/2006

COMMON ORAL JUDGMENT : (Per : MR.JUSTICE J.M.PANCHAL)

1 By filing abovenumbered three applications under Section 482 of the Code of Criminal Procedure, 1973, the petitioner who is ordered to be impleaded as an accused under Section 319 of the Code of Criminal Procedure, for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the "Act" for short) in Criminal Case No. 129/99, Criminal Case No. 127/99 and Criminal Case No. 128/99 instituted by the respondent No.2 in the Court of learned Chief Judicial Magistrate, Surendranagar, against the respondents Nos. 3 and 4 has prayed to quash the abovenumbered three criminal cases lodged by the respondent No.2.

2 The facts emerging from all the abovenumbered three applications are common and, therefore, this Court proposes to refer to the facts of Criminal Misc. Application No. 6682/2005 for convenience, which are as under.

3 The respondent No.2, who is original complainant, is proprietor of Bharat Cotton Company, which is dealing in cotton bales at Surendranagar. The respondent No.3 i.e. Mr. Anil Gupta, is Director of the respondent No.4 company whereas the respondent No.4 i.e. R.P. Texfab Limited, is a company registered under the provisions of the Companies Act, 1956. The respondent No.3 purchased cotton bales from the complainant

for and on behalf of respondent No.4 Company on credit, and an amount of Rs.1 lakh was due and payable by the respondent Nos. 3 and 4 to the complainant. The respondent No.3 issued an account payee Cheque No. 256112 dated November 20, 1998, drawn on the Union Bank of India, Noida Branch. The complainant presented the said cheque in State Bank of India, Surendranagar Branch, on November 20.1998. The cheque was returned and dishonoured by Union Bank of India, Noida Branch, with an endorsement that “funds are insufficient”. The complainant was informed about dishonour of the cheque by the State Bank of India, Surendranagar Branch, on December 15, 1998. The complainant, therefore, served a notice dated December 23, 1998 upon respondents Nos. 3 and 4 as required by Section 138 of the Act. The notices were dispatched to the respondents No. 3 and 4 by Regd. Post A.D. The claim of the complainant is that the respondents Nos. 3 and 4 did not accept the notices with a view to avoiding service of the notices on them and, therefore, the notices were returned unserved with endorsement “addressee not traced”. What is claimed by the complainant is that the respondents Nos. 3 and 4 knew very well about the issuance of the notices as they had telephonic talk with the complainant but they have avoided payment of the amount due on the one pretext or the other. The respondents Nos. 3 and 4 did not make payment of the amount due within 15 days from the date of notices. The complainant has, therefore, filed complaint in the court of learned Chief Judicial Magistrate, Surendranagar,

on February 10, 1999 and prayed the Court to convict the respondents Nos. 3 and 4 for commission of offence punishable under Section 138 of the Act and Section 420 of the Indian Penal Code.

4 On presentation of the complaint, the learned Magistrate recorded evidence of the complainant on February 10, 1999 as required by Section 200 of the Code and directed to register the complaint as well as issue summons to the respondents Nos. 3 and 4, vide order dated February 10, 1999. Pursuant to the direction given by the learned Magistrate, the complaint lodged by the complainant is registered as Criminal Case No. 129/99.

5 On October 20, 2001, the original complainant presented an application at Exhibit-50 under Section 319 of the Code of Criminal Procedure, 1973, mentioning, inter alia, that at the time of issuance of cheque by the respondent No.3, the petitioner was also a Director of R.P. Taxfab Limited and as he was in-charge of and was responsible to the respondent No.4 company for the conduct of its business, he should also be proceeded against for the commission of offence punishable under Section 138 of the Act. In order to substantiate his averments, the respondent No.2 annexed a copy of Agreement dated August 12, 1999 executed between (1) Mrs. Kamlesh Ashok Sancheti, Proprietor of M/s Arihant Corporation, Ahmedabad, and

(2) Ashok Kumar Sancheti, Proprietor of M/s Mitali Enterprises on the one hand and (1) the petitioner as Director of M/s Taxfab Ltd and (2) Mr. Satish Chand Sancheti, M.D. Of M/s Broadways Textile Limited, Kanpur, on the other. On presentation of the application, the learned Magistrate, fixed the same for hearing. After hearing the learned counsel of the complainant and considering the contents of the application and the document annexed thereto, the learned Judge passed following order, on February 25, 2002, below Application Exhibit-50

Order

> "Issue notice to the proposed accused, to show cause why he should not be joined as co-accused in the said case filed against the company and the signatory of the cheque, returnable on 25.2.2002."

6 The record shows that though the petitioner was duly served with the notice, he did not remain present before the learned Magistrate either in person or through his Lawyer. Therefore, the learned Magistrate heard the learned counsel of the complainant and considered Agreement produced by the complainant with his application at Exhibit-50/1 to decide as to whether the petitioner should be joined as an accused. On consideration of Agreement produced by the complainant at Exhibit-50/1, the learned Judge held that the petitioner was

one of the Directors of the respondent No.4 company, and was liable to be joined as an accused. In view of said conclusion, the learned Magistrate allowed Application Exhibit-50, vide order dated October 09, 2002. As the petitioner was impleaded as one of the accused in the complaint lodged by the original complainant, summons was served upon him. On service of summons, the petitioner filed an application at Exhibit-63 under Section-204 of the Code of 1973, and prayed the court that order dated October 09, 2002 impleading him as one of the accused in the complaint lodged by the original complainant, be recalled and quashed, for the reasons stated in the application. It may be stated that Section 204 of the Code deals with issuance of process and is part of Chapter-XVI, which relates to the commencement of proceedings before Magistrate. It nowhere enables a Magistrate to recall his order issuing summons nor does it empower him to quash the order passed by him under Section 319 of the Code. Therefore, it is not understood by this Court as to why Application Exhibit-63 was filed by the petitioner under Section 204 of the Code, praying that earlier order impleading him as one of the accused in the complaint, lodged by the original complainant, be recalled and/or quashed. However, the fact remains that, the said application was filed under Section 204 of the Code, and is yet not decided. The petitioner has stated in the instant applications that he was not knowing about the transaction between the respondent No.2 on the one hand and the respondents

Nos. 3 and 4 on the other and, therefore, the complaint lodged by the respondent No.2, is liable to be quashed. According to him, he was not served with any notice under Section-138 of the Act and, therefore, neither the complaint is maintainable against him nor the learned Magistrate could have decided to proceed against him for commission of offence punishable under Section 138 of the Act. The petitioner has stressed that the cheque in question was never signed by him as Director of the respondent No.4 Company and, therefore, the prosecution against him being misconceived, should be quashed. According to the petitioner, the cheque which is the subject matter of complaint of the respondent No.2, was signed by the respondent No.3 on behalf of the respondent No.4 company, and as the petitioner has nothing to do with the issuance of cheque, the order impleading him as one of the accused, should be set aside. The petitioner has mentioned that no allegation was made by the complainant in the complaint against the petitioner that petitioner was one of the Directors of the respondent No.4 company and/or he was in-charge and was responsible to the company for the conduct of its business and, therefore, the learned Magistrate was not justified in entertaining the application filed by the complainant under Section 319 of the Code. The petitioner has averred that the petitioner is shown as one of the accused by the complainant mala fide and, therefore, also the complaint instituted by the original complainant deserves to be quashed. What is asserted by the

petitioner is that he was one of the Directors of the respondent No.4 company from February 24, 1998 to may 1, 1998, which is clear from Form No. 32, and as he was not party to the transaction in question and had ceased to be the Director of the respondent No.4 Company before issuance of cheque dated November 20, 1998, the proceedings initiated by the respondent No.2 against him should be quashed. Under the circumstances, the petitioner has filed the instant applications and claimed relief to which reference is made earlier.

7 The application was placed for admission hearing before the learned Single Judge of this Court, who after hearing the learned counsel for the petitioner and the learned APP for the State, issued Rule and granted interim relief. After service of notice was effected on the original complainant, the application was taken up for final hearing. One of the points, which was urged by learned counsel for the petitioner, was that the complaint lodged by the respondent No.2 was liable to be quashed for want of notice to be issued and served upon him under Section 138 of the Act. In answer to this contention, reliance was placed by the learned Counsel of the complainant on the decision rendered by the learned Single Judge of this Court in BHAVESH B METHA AND ANR vs. STATE OF GUJARAT AND ANR, 1998 (2) GLH 567, wherein it is held that in view of deeming fiction incorporated in Section 141 of the Negotiable Instruments Act, 1881, it was not necessary for the

original complainant to serve a notice on the applicant under Section 138 of the Act. The learned Single Judge, who heard the instant application, was of the view that service of notice under Section 138 of the Act, 1881 was *sine-qua-non* before recording conviction under Section 138 r.w. Section 141 of the Negotiable Instruments Act and, therefore, view expressed by the learned Single of this Court in Bhavesh B Mehta (supra) deserves reconsideration. The learned Single Judge has, therefore, referred the matter to the Division Bench for expressing final view on the question whether is it necessary for the complainant to serve notice under Section 138 of the Negotiable Instruments Act, 1881, on the Director of the Company, who was in-charge of and was responsible to the company for the conduct of its business, and is deemed to be guilty of the offence punishable under section 138 of the Act.

8 Mr. Viren G Dave, learned counsel for the petitioner contended that neither the trial in the case has commenced nor evidence is adduced by the original complainant and, therefore, the petitioner could not have been impleaded as one of the accused in the complaint lodged by the respondent No.2. It was argued that the powers under Section 319 of the Code are exercised by the learned Magistrate of Trial Court, lightly, which should be exercised sparingly and, therefore, the order impleading the petitioner as one of the accused deserves to be set aside. It was emphasized that as per the scheme of the Act,

mere dishonour of cheque does not attract criminal liability under Section 138 of the Negotiable Instruments Act, but criminal liability would be attracted only after the statutory notice is served and thereafter default in making payment within the statutory period takes place and, therefore, service of notice under Section 138 of the Act on the Director, who is sought to be fastened with the criminal liability under Section 141 of the Act, should be held to be absolutely necessary. It was argued that default in making payment of the amount due after receipt of statutory notice by the person concerned creates criminal liability and, therefore, the view expressed by the learned Single Judge of this Court in Bhavesh B. Mehta (supra) should not be accepted by this Division Bench. According to the learned Advocate for the petitioner, since company, which is a juristic person, cannot be convicted with imprisonment, and Director of the company, who at the time when the offence was committed, was in-charge of and was responsible to the company for the conduct of the business of the company, is made liable under Section 141 of the Act, it should be held by the Court that the service of notice on the Director and/or officer of the company sought to be made liable under Section 141 of the Act, is a must. The learned Advocate for the petitioner contended that having regarding to the object of Sections 138 and 141 of the Act, it should be held that in absence of notice to the petitioner, the complaint lodged by the respondent No.2, was not

maintainable. According to the learned Counsel, the petitioner had resigned as Director of the respondent No. 4 Company long back, before the cheque in question was issued by the respondent No.3 and, therefore, the three applications should be allowed.

9 Mr. Ajay R Mehta, learned counsel for the respondent No.2 i.e. the original complainant, contended that on issuance of summons to the accused named in the complaint lodged by the respondent No.2, the trial has already commenced and as the respondent No.2 had supported his averments made in the application filed under Section 319 of the Code to the effect that the petitioner was in-charge of and was responsible to the Company for the conduct of the business of the company, by production of material, namely, the document at Mark 50/1 indicating that the petitioner had held out himself to be one of the Directors of the company to Mrs. Kamlesh Ashok Sancheti, Proprietor of M/s Arihant Corporation, Ahmedabad, and Ashok Kumar Sancheti, Proprietor of M/s Mitali Enterprises, Ahmedabad, the learned Magistrate was justified in impleading the petitioner as one of the accused in the complaint lodged by the respondent No.2. In support of the submission that the material and/or evidence produced by the original complainant was sufficient to enable the learned Magistrate to exercise powers under Section 319 of the Code, the learned Counsel has placed reliance on the decision in RAKESH AND OTHERS vs. STATE

OF HARYANA, (2001) 6 SCC 248. It was argued that prosecution under Section 138 of the Act can be maintained against the person in-charge of the company for conduct of the business, and it is not necessary to serve a notice on the person, who is sought to be prosecuted under Section 138 r.w. Section 141 of the Act before convicting him. The learned Counsel emphasized that the legal fiction created by Section 141 of the Act, must be given its full play, and it should be deemed that notice under Section 138 of the Act was served on the Director, who is sought to be saddled with the liability under Section 141 of the Act. It was argued that the statements made in the complaint by the respondent No.2 if taken at the face value, make out an offence punishable under Section 138 of the Act, and therefore, the applications for quashing the complaints should be dismissed.

10 Mr. H.M. Prachchhak, learned APP for the State, argued that the order passed by the learned Magistrate, impleading the petitioner as one of the accused in the complaint filed by the respondent No.2 is perfectly just and no ground is made out to interfere with the same in the instant applications. It was argued that before convicting a Director or the Officer in-charge of the company, it is not necessary that statutory notice contemplated by Section 138 of the Act, should be served on him in view of legal fiction created by the Legislature and, therefore, the view taken by the learned

Single Judge of this Court in Bhavesh B Mehta (supra) should be approved by this Court. The learned Government Counsel contended that because of the deeming fiction incorporated in Section 141 of the Act, every person, who at the time the offence was committed, was in-charge of and was responsible to the company for the conduct of business of the company as well as the company, are deemed to be guilty of the offence and, therefore, the said provision which is enacted to achieve laudable object, should not be rendered nugatory by interpreting that service of notice under Section 138 of the Act is a condition precedent before recording conviction of the person, who at the time the offence was committed, was in-charge of and was responsible to the company for the conduct of business of the company. The learned Counsel emphasized that no case is made out by the petitioner for quashing complaints lodged by the respondent No.2 and, therefore, the applications, which have no merits should be dismissed.

11 This Court has heard Mr. Viren G. Dave, learned counsel for the petitioner, Mr. Ajay R. Mehta, learned counsel of the respondent No.2 as well as Mr. H.M. Prachchhak, learned APP for the State at length and in great detail. This Court has also considered the documents forming part of the application, produced by the parties.

12 The plea that neither the trial has commenced nor

the evidence is led to show that the petitioner was in charge of and was responsible to the respondent No. 4 company for the conduct of the business of the company and, therefore, the order passed by the learned Magistrate, in exercise of powers conferred by Section 319 of the Code, should be set aside, is devoid of merits. Before answering this plea, it would be relevant to notice the scheme for trial envisaged by the Negotiable Instruments Act, 1881 and the provisions of the Code. Section 142, inter alia, provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque. The record shows that the respondent No.2, who is payee, has filed the complaint in writing for alleged commission of offence punishable under Section 138 of the Act by the accused named therein. Section 143 (1) of the Act, inter alia, specifies that notwithstanding anything contained in the Code of Criminal Procedure, 1973, all offences under this Chapter shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the provisions of sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials. Section 262 of the Code makes provision for the procedure to be adopted for the summary trials. Sub-section(1) of the said Section states that in trials under this Chapter, the procedure specified in this

Code for the trial of summons-case shall be followed except as hereinafter mentioned. Section 204 forming part of Chapter XVI which deals with commencement of proceeding, before Magistrates, provides that if in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding and the case appears to be a summons case, he shall issue his summons for the attendance of the accused. The record shows that the summons have already been issued for the attendance of the accused named in the complaint vide order dated February 10, 1999. In DR. S.S.KHANNA vs. CHIEF SECRETARY, PATNA AND ANR., AIR 1983 SC 595 while explaining the scope of Sections 202, 300 and 319 of the Code, the Supreme Court has ruled that an Inquiry under Section 202 is not in the nature of a trial for there can be in law only one trial in respect of any offence and that a trial can commence only after process is issued to the accused. Applying the principle laid down in the above quoted decision to the facts of the case, it will have to be held that the trial has already commenced after process is issued to the accused. Section 319 of the Code empowers the Court to proceed against other persons appearing to be guilty of offence. Sub-section (1) of the said Section stipulates that where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he

appears to have committed. The first question which needs to be determined is as to what is the meaning of the word `evidence' appearing in Section 319 of the Code. By the Evidence Act, which applies to the trial of all criminal cases, the expression `evidence' is defined in Section 3 as meaning and including all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry and documents produced for the inspection of the court which are called documentary evidence. What the Legislature intended to denote whenever the word `evidence' is used is explained in this clause. Word `evidence' means instruments by which relevant facts are brought before the court viz. witnesses and documents by means of which the court is convinced of the facts. In RAMNARAYAN MOR AND ANOTHER vs. THE STATE OF MAHARASHTRA, AIR 1964 SC 949, a police report was lodged in the court of Magistrate First Class against the appellants and others, on charges for offences punishable under Sections 406, 408, 409, 120-B and 477 of IPC. The copies of documents required to be furnished were supplied to the accused. At the commencement of the enquiry, the Public Prosecutor informed the court that the evidence in the case being `mainly documentary' the prosecution did not desire to examine any witnesses at the stage of committal proceedings. That application was granted by the Magistrate and the accused were ordered to remain present in court for their examination under sub-sections (6) and 7 of

Section 207-A of the Old Code of 1898. The appellants in their appeal in the Supreme Court contended that in enquiry for commitment to the Court of Session, the accused person would be asked to explain circumstances appearing against him only from the oral evidence recorded under Section 207 A(4) and not from the circumstances appearing from the documents furnished. Negativing the said contention, the Supreme Court held that "the Legislature has used the expression `in the evidence against him' which is not expressly qualified by reference to sub-sec. (4) nor does any implication arise from the context which would suggest that it has a limited content". Again in Rakesh and Another (supra), the question considered by the Supreme Court was – whether the statement of a prosecution witness without the said witness having been cross-examined, constituted `evidence' within the meaning of Section 319 of the Code. After noticing the definition of the word `evidence' as contained in Section 3 of the Evidence Act, the Supreme Court has made following pertinent observation in para-13 of the reported decision :

> "13 Hence, it is difficult to accept the contention of the learned counsel for the appellants that the term `evidence' as used in Section 319 of the Code of Criminal Procedure would mean evidence which is tested by cross-examination. The question of testing the evidence by cross-examination would arise only after addition of

the accused. There is no question of cross-examining the witness prior to adding such person as accused. The Section does not contemplate an additional stage of first summoning the person and giving him an opportunity of cross-examining the witness who has deposed against him and thereafter deciding whether such person is to be added as accused or not. The word `evidence' occurring in sub-section (1) is used in a comprehensive and broad sense which would also include the material collected by the investigating officer or evidence which comes before the court and from which the court can prima facie conclude that the person not arraigned before it is involved in the commission of the crime." (emphasis supplied)

In KISHORESINH AND ANR vs. STATE OF BIHAR AND ANR, (2006) 1 SCC 275 the phrase "it appears from the evidence" has been interpreted to mean the evidence or the materials brought on record in course of trial. In M/S OMPRAKASH SHIVPRAKASH vs.K.I. KURIAKOSE AND OTHERS, AIR 1999 SC 3870, the question considered was whether impleadment of the appellant as accused under Section 20-A of the Prevention of Food Adulteration Act, 1954, was premature. After examining the scope of Section 319 of the Code and Section 20-A of the Prevention of Food Adulteration Act, 1954, the Supreme Court has held as under :

"Power of the court to implead the manufacturer,

distributor or dealer, in cases involving offences under the Act, is envisaged in Section 20-A of the Act. The provision overrides the ban contained in Section 20 of the Act that no prosecution shall be instituted for the offences under the Act except by or with the consent of the authorities mentioned in the Section. One of the differences between S. 319 of the Code and S. 20-A of the Act is that, while in the former even if it appears to the Court from the evidence (either during inquiry or trial of the offence), that another person is to be tried along with the already arraigned accused, then the Court can proceed against that other person, while in the latter the satisfaction of the Court that such manufacturer (distributor or dealer) is also concerned with that offence must be gathered from “the evidence adduced before it during the trial”. In other words, the power under S. 20-A cannot be invoked until the trial begins and after the trial ends.”

The position of law emerging from the decisions of the Supreme Court is thus very clear that before exercising powers under Section 319 of the Code, it is not necessary that the evidence must have been adduced in the case and a document which may be produced with the application filed under Section 319 of the Code also constitutes `evidence' within the meaning of the said Section. The facts of the instant case make it very

clear that after the commencement of trial, the original complainant i.e. respondent No.2 submitted an application under Section 319 of the Code on October, 20, 2001 stating, inter alia, that the petitioner was in-charge of and was responsible to the company for the conduct of the business of the company and, therefore, he should be impleaded as an accused in the complaint which was already lodged and pursuant to which summons were issued to the accused. Along with the said application, the respondent No.2 also annexed copy of the Agreement dated August 12, 1999, entered into between (1) Mrs. Kamlesh Ashok Sancheti, Proprietor of M/s Arihant Corporation, Ahmedabad and (2) Shri Ashok Kumar Sancheti of M/s Mitali Enterprises, Ahmedabad, on the one hand and the petitioner as Director of M/s R.P. Texfab Ltd., and (2) Mr. Satish Chand Sincheti, Managing Director of M/s Broadways Textile Limited, on the other, for supply of cotton worth of Rs.1.20 crores to the purchaser. On presentation of the application, the learned Magistrate issued notice to the proposed accused i.e. petitioner calling upon him to show cause as to why he should not be joined as a co-accused in the said case filed against the company and the signatory of the cheque. The notice issued was made returnable on February 25, 2002. The record unerringly establishes that the petitioner was duly served, but he did not remain present before the court of learned Judicial Magistrate, First Class, Surendranagar, to contest the application. The learned Magistrate had no alternative but to

hear the learned Counsel of the original complainant and pass appropriate orders after considering the material brought on record in course of the trial. The learned Magistrate considered the uncontroverted material and has passed the impugned order. Thus, on the basis of uncontroverted material namely the documentary evidence produced by the respondent No.2 with the application under Section 319 of the Code, the learned Magistrate has exercised powers under Section 319 of the Code after commencement of trial. The power exercised by the learned Magistrate under Section 319 of the Code cannot be termed as contrary to the provisions of the Code or arbitrary or unwarranted so as to call for interference of this Court in the instant applications filed under Section 482 of the Code. Therefore, the first plea, which has no substance, is hereby rejected.

13 As is evident the petitioner has raised several points for consideration of the Court. However, on screening those points, this Court finds that they are defences pleaded by the petitioner and cannot be gone into by this Court in the applications which are filed under Section 482 of the Code of Criminal Procedure. The contention that the petitioner was not knowing about the transaction between the respondent No.2 on the one hand and the respondents Nos. 3 and 4 on the other, or the plea that he was not a Director of the respondent No.4 company at the relevant time, or the contention that he had

resigned as Director of respondent No.4 company on May 01,1998 and, therefore, not liable for prosecution under Section 138 of the Act, are the defences pleaded by the petitioner and will have to be proved by him at the trial. Therefore, the defences, which are raised by the petitioner in the instant applications, are not adjudicated upon, and it is clarified that it will be open to the petitioner to lead proper evidence in support of his defences at the trial.

14 In order to answer the main question referred to the Division Bench, it would be appropriate to notice the object of the Act. While explaining the object of Sections 138 and 139 of the Act by the Supreme Court in GOA PLAST (P) Ltd. vs. CHICO URSULA D' SOUZA, (2004) 2 SCC 235 noticed that proper and smooth functioning of business transactions, particularly, all cheques as instruments, primarily depends upon the integrity and honesty of the parties, and in our country in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. It was noticed that the sanctity as well as credibility of issuance of cheques in commercial transactions was eroded to a large extent and cheques were issued for payment of admitted liability but the drawer used to dishonour the said liability by issuing instructions to the bank for stop payment. The Supreme Court further noticed that dishonour of a cheque by the bank causes

incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside country suffers a serious set back. The Supreme Court has explained that to avoid the aforesaid and to create an element of credibility and dependability, Sections 138 and 139 were enacted which provide criminal remedy of penalty if the ingredients of Sections are satisfied. Again in MONABEN KETANBHAI SHAH AND ANR vs. STATE OF GUJARAT AND ORS, (2004) 7 SCC 15, the Supreme Court has held that object of Sections 138 and 141 of the Negotiable Instruments Act, 1881 is to prevent bouncing of cheques and sustain the credibility of commercial transactions. The Supreme Court has further explained that these provisions create a statutory presumption of dishonesty, exposing a person to criminal liability if payment relating to dishonoured cheque is not made within statutory period even after issue of notice. Therefore, the question posed for determination of this Bench, will have to be determined by placing a broader liberal and purposeful construction on Sections 138 and 141 of the Act in furtherance of the object and the purpose of the legislation and the provisions will have to be construed in a wider sense, to effectuate the intendment of the Act. Section 141 deals with offences by companies and reads as under :

> *"141.* ***Offences by companies.****-(1) If the person committing an offence under Section 138 is a*

company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributed to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

15 A bare reading of the above quoted provisions makes it very clear that a legal fiction is created by the Legislature pursuant to which every person who at the time of offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, is deemed to be guilty of the offence. The effect of Section 141 is that when the company is the drawer of the cheque, such company is the principal offender under Section 138 of the Act and everyone who was in-charge of, and was responsible for the conduct of the business of the company and any other person, who is a director or a manager or a secretary or other officer of the company, with whose consent or connivance or due to his neglect,the company has committed the offence, are made offenders by virtue of the legal fiction created by the Legislature as per the Section. The principles governing interpretation of a provision containing a legal fiction are well settled. The Legislature is quite competent to create a legal fiction, in other words, to enact the deeming provision for the purpose of assuming the existence of a fact, which does not really exist, provided the declaration of non-existent facts as existing, does not offend the Constitution. If the words “deemed to be” are used , they create a fiction and a thing is treated to be that which in fact it is not. A legal fiction is one which is not an actual reality and which the law recognizes and the court accepts as a reality. Therefore, in case of a legal fiction, the courts

believe something to exist which in reality does not exist. It is nothing but a presumption of the existence of the state of affairs which in actuality is not-existent. The effect of such legal fiction is that a position which otherwise would not obtain is deemed to obtain under the circumstances mentioned in the provision containing legal fiction. In interpreting a provision creating a legal fiction, the court has to ascertain for what purpose the fiction is created and after ascertaining this, the court is to assume all those facts and consequences which are incidental or inevitable corollaries to give effect to the fiction though in construing the fiction, it is not to be extended beyond the purpose for which it is created. After ascertaining the purpose, full effect must be given to the statutory fiction, and it should be carried to its logical conclusion, and to that end, it is proper and even necessary to assume all those facts, on which alone the fiction can operate. In EAST END DWELLINGS CO. LTD. v. FINSBURY BOROUGH COUNCIL, 1952 AC 109, it is observed by Lord Asquith that “if you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that

state of affairs.” Mention to the decision of the Supreme Court in COMMISSIONER OF INCOME TAX DELHI vs. A TEJA SINGH, AIR 1959 SC 352 would not be inappropriate. Section 18A(3) of the Income Tax Act 1922 required any person not hitherto assessed, to send in certain circumstances an estimate of his income to the ITO for the purpose of advance payment of tax. Section 18-A (9) of the Act was as under :

> *“If the Income-tax Officer, in the course of any proceedings in connection with the regular assessment, is satisfied that any assessee -*
>
> *(a) has furnished under sub-s.(2) or sub-s. (3) estimates of the tax payable by him which he knew or had reason to believe to be untrue, or*
>
> *(b) has without reasonable cause failed to comply with the provisions of sub-s.(3),*
>
> *the assessee shall be deemed, in the case referred to in cl.(a) to have deliberately furnished inaccurate particulars of his income, and in the case referred to in cl. (b), to have failed to furnish his return of his total income; and the provisions of S. 28, so far as may be, shall apply accordingly.”*

Thus, Section 18A(3) of the Income Tax Act provided that if

during the course of regular assessment, the ITO was satisfied that such person had without reasonable cause, failed to comply with Cl. (3), the assessee “shall be deemed to have failed to furnish the return of his total income; and the provisions of Section-28, so far as may be, shall apply accordingly.” The question which was considered by the Supreme Court was whether a penalty could be levied under Section 28 which provided for levy of penalty when a person without reasonable cause failed to furnish a return of his total income, if notices under Section 22(2) or Section 34 had been issued to him. The Supreme Court answered the question in the affirmative and held that the failure to send the estimate under Section 18-A (3) was, by fiction created by Cl. (9) of the same section, deemed to be failure to send a return, and consequently “all those facts, on which alone, there could be failure to send the return must be deemed to exist and it must accordingly be taken that by reason of this fiction notices required to be given under Section 22 must be deemed to have been given” making Section 28 applicable. Applying the principle laid down by the Supreme Court in Commissioner of Income Tax, Delhi (supra) to the facts of the present case, it will have to be held that notice required to be given under Section 138 of the Act must be deemed to have been given while recording conviction of a Director or an officer etc of the company under Section 138 r.w. Section 141 of the Act. If the contention raised by the learned Counsel of the petitioner at the Bar is accepted, it

would make operation of Section 141 of the Act unworkable. It is well settled that a provision of law should be interpreted in such a manner so as to secure the object of the Act and not to frustrate the same or make the provision otiose. In view of the purpose and object of the full effect will have to be given to the statutory fiction, and existence of all those facts, on which alone there could be conviction under Section 141 must be deemed to exist. It must accordingly be taken that by the reason of the legal fiction incorporated in Section 141 of the Act, the notice as required to be given under Section 138 of the Negotiable Instruments Act must be deemed to have been given making the person liable if other conditions set out in Section 141 of the Act are satisfied.

16 Having regard to the abovestated interpretation of Sections 138 and 141 of the Act, this Court is of the opinion that the view taken by the learned Single Judge of this Court in Bhavesh B Mehta(supra) does not require reconsideration and it is hereby upheld as it is eminently just. The plea that for want of notice to the petitioner under Section 138 of the Negotiable Instruments Act from the original complainant, the criminal cases instituted by him are liable to be quashed, cannot be accepted and is hereby rejected.

17 In S.A. NANJUNDESWARA vs. VARLAK AGROTECH (P) LTD., (2002) 10 SCC 249, the Supreme Court has held that quashing of

proceedings initiated under Section 138 of the Negotiable Instruments Act, 1881 in exercise of power under Section 482 of the Code of Criminal Procedure, 1973, would be justified only if the High Court comes to the conclusion that the statements made in the complaint, even taken at the face value, do not make out any offence. The statements made in the complaint of the respondent No.2, taken at the face value, make out an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 and, therefore, the instant applications filed under Section 482 of the Code cannot be granted and are liable to be dismissed.

18 For the foregoing reasons, the applications fail and are dismissed. Rule is discharged in each application. Ad interim relief granted earlier in each matter is hereby vacated.

19 Having regard to the facts of the case, the learned Magistrate who is seized of the matter is requested to dispose of the Criminal Cases instituted by the respondent No.2 as early as possible and without any avoidable delay.

(J.M.PANCHAL,J.)

(J.R.VORA, J.)

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